United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1198

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES OF AMERICA,

Appellee,

-against-

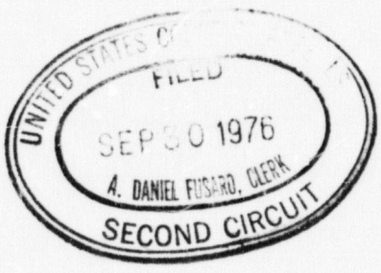
DAVID DURANT,

Appellant.

Docekt No. 76-1198

REPLY BRIEF FOR APPELLANT
DAVID DURANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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PHYLIS SKLOOT BAMBERGER

Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	
-against-	:	Docket No. 76-1198
DAVID DURANT,	:	
Appellant.	:	

REPLY BRIEF FOR APPELLANT
DAVID DURANT

The government argues that appellant's trial attorney made no showing that a defense expert witness would have served any useful purpose. Based on the record below, the government's argument is disingenuous. Even the Assistant United States Attorney and the district judge recognized at the pretrial proceedings that defense counsel had the right and the responsibility to cross-examine the government expert about the evidence the government would introduce. It follows that counsel must prepare whether and how to cross examine that witness, as he must prepare other aspects of his case. Cf. United States v. DeCoster, 487 F.2d 1197, 1201 (D.C. Cir. 1973); United States ex rel. Williams v. Follette, 408 F.2d 658, 660 (2d Cir. 1969), reversed on other grounds sub nom. McMann v. Richardson, 397 U.S. 759 (1970); Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962); Thomas v. Zelker, 332 F.Supp. 595, 599-601 (S.D.N.Y. 1971). For that, he must speak with a defense expert witness. The need for the expert

is obvious in the circumstances; it is apparent to anyone who adequately represents his client, and no verbalization is necessary. This, of course, was implicit in Jencks v. United States, 353 U.S. 657 (1957), involving the submission to the defense of the prior written statements of government witness for purposes of impeachment:

> We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

To adequately cross examine defense counsel must know the procedures for lifting prints, the chemicals used, and the procedures for comparing prints. Without giving the defense opportunity to prepare, the Judge's correct and appropriate instruction (Transcript at 356, 357 and main brief at 11) telling the jurors they could reject the testimony of the expert was a meaningless gesture.

Although counsel had several legitimate reasons for needing his expert (see main brief), twice in its brief, the government argues that there was no error in refusing to grant the motion for the expert witness because there was no basis for concluding the latent print was not appellant's. The point is that counsel had no opportunity to consult an expert on that issue. The

need for expert evidence to establish the government's use of false fingerprints is demonstrated by United States v. DiPalma, #1458 (C.D. Cal. 1967). In DiPalma, a federal prosecution for bank robbery, both local police and FBI fingerprint expert testified that a set of latent prints taken from the bank matched the defendant's. Later, a petition pursuant to 28 U.S.C. §2255 was granted after it was discovered by experts for the defendant that the latent prints had not been taken from the bank involved, but were the prints made from a copy of the defendant's prints in a police file.* The initial clue which began the proceeding was apparently the fact that the alleged latent print and the defendant's print matched perfectly.

Contrary to the government's brief, there is no overwhelming evidence in this case. The key to the government's case, as acknowledged by the Assistant United States Attorney on eight occasions in his summation to the jury, was the fingerprint evidence. Otherwise the government's case consisted of the testimony of two accomplices, Freeman and Reed. Their testimony was substantially impeached by the lies the witnesses told and promises made by the government, including the declination to prosecute Freeman. The government cites United States v. Carney, 328 F.Supp. 966, 967-69 (D. Del 1971), aff'd, 455 F.2d

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* The scientific procedures involved are outlines in the attached memorandum prepared by the federal Public Defender for Central District of California.

925 (3d Cir. 1972),in support of its argument. As might be presumed from the government's scanty treatment of Carney, it is not relevant here. There the motion for the expert witnesses was denied because that motion was untimely and the defendant was arrested in possession of the objects on which it was asserted that his fingerprints were located.

CONCLUSION

For the above stated reasons on those in the main brief the judgment below must be reversed.

Respectfully submitted,

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PHYLIS SKLOOT BAMBERGER,

Of Counsel

GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : John K. Van de Kamp
Federal Public Defender

DATE: March 4, 1974

FROM : S. Thomas Pollack
Deputy Federal Public Defender

SUBJECT: William De Palma

Attached is a copy of the article in the Los Angeles Times on the De Palma case. At your request, I have prepared for circulation to other public defender offices a brief outline of the scientific and other evidence supporting the conclusion that De Palma's fingerprint introduced in evidence against him was a falsified print.

At the original trial, two police officers from the Buena Park Police Department testified that during a crime scene investigation following a bank robbery, they lifted several prints from a teller's counter and that one of the prints lifted was De Palma's. One of these two officers testified as an expert fingerprint witness that there were 19 points of similarity between De Palma's known print and the questioned latent print. A FBI fingerprint expert testified that the questioned print did in fact belong to De Palma.

The counter at the bank was dusted with black fingerprint dusting powder and the raised prints were then lifted off with fingerprint lifting tape and backed on clear plastic cards. One of these cards was introduced at trial, bearing the tape containing the latent print that turned out to be De Palma's.

De Palma was convicted in 1968 and sentenced to 15 years. In 1973, we filed a section 2255 petition based upon the fingerprint.

Criminalists at the Orange County Sheriff's Office crime laboratory determined that the particle matter making up the De Palma print, when looked at through a microscope at 50 magnification, was totally similar visually to particles of xerox toner and totally dissimilar to fingerprint dusting powder. Similar examinations were made using a scanning electron microscope and, at 1,000 magnification, the similarities and dissimilarities were even more graphic.

After the determination was made that the De Palma fingerprint was not made with fingerprint dusting powder, the next problem was to determine where in fact the print had come from. An experiment was made by taking a fingerprint card, xeroxing it, placing a piece of fingerprint lifting tape on top of the xeroxed paper and then lifting off the xeroxed image of the fingerprint. This was then placed under a microscope at 50 magnification and the resulting product was visually totally similar to the De Palma print.

It was then determined that at the time of the investigation, the Buena Park Police Department had in their possession an old fingerprint exemplar card belonging to De Palma. These materials were turned over to a fingerprint expert at the Orange County crime lab who determined that if the De Palma "latent" print was placed on top of the corresponding print on De Palma's fingerprint exemplar card, all ridge characteristics and cut off points coincided exactly. The expert concluded that based upon his experience, it was impossible for two fingerprints of the same finger to be exactly alike in all characteristics. He performed an experiment by placing his own finger on an inking pad and then putting it down on a piece of paper 100 times using an equal amount of pressure. He then compared all of these prints and no two were identical. He concluded that the only explanation for the exact overlay was that the De Palma "latent" print came off of the old fingerprint exemplar card.

As the criminalists determined that the particle matter making up the De Palma questioned print appeared totally similar to xerox toner, that it was possible to xerox a fingerprint card and then lift that impression off with fingerprint lifting tape, and that the overlays of the old fingerprint card and the questioned print were identical, it was concluded that the print introduced at trial was not lifted off of the teller's counter as testified but rather was taken off a xeroxed copy of De Palma's old fingerprint exemplar card.

The FBI laboratory in Washington also examined the questioned print and they reached similar conclusions as to the make up of the particle matter in the De Palma print.

The person who was the head of the Buena Park Police Department crime laboratory at the time of the De Palma's trial and who testified as an expert fingerprint witness is now under indictment in Orange County on charges of perjury and falsifying

evidence in unrelated state cases. The District Attorney for Orange County is hopeful of using the materials developed in the De Palma case as a prior similar act in the Orange County trial.

It is anticipated by local fingerprint experts that as a result of this case and the attendant publicity, fingerprint evidence will come into increasing scrutiny in the future. It should be noted that there was testimony at the original De Palma trial that a photograph had been taken of the teller's counter after the prints were raised with the fingerprint dusting powder and before they were lifted off with the fingerprint lifting tape. This is apparently standard procedure to protect against the possibility of ruining prints in the process of transposition to tape and so that there will always be a record of where a questioned print came from. Unfortunately, in this case, there was no follow-up request for production of that photograph at the trial. During the preparation for the section 2255 petition, we attempted to locate photograph. We were informed by the Buena Park Police Department that it was no longer in their files.

Attachment

CERTIFICATE OF SERVICE

September 29, 1976

I certify that a copy of this reply brief ~~and appendix~~ has been mailed to the United States Attorney for the Eastern District of New York.

Jonathan Shapiro